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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 153.

ELEANORA D. SPEER ET AL., APPELLANTS,

*vs.*

MICHAEL J. COLBERT, TRUSTEE, ET AL.

# BRIEF FOR APPELLANT, MRS. ELEANORA D. SPEER.

J. R. LAMAR,
*Counsel for said Appellant.*

(19,587.)

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

## No. 153.

ELEANORA D. SPEER, IN HER OWN BEHALF AND BY EMORY SPEER, HER HUSBAND AND NEXT FRIEND; JAMES MOSHER, ONE OF THE SUBSTITUTED TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF ETHELBERT CARROLL MORGAN, DECEASED, AND ANNA MOSHER, APPELLANTS,

*vs.*

MICHAEL J. COLBERT, ONE OF THE SUBSTITUTED TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF ETHELBERT CARROLL MORGAN, DECEASED, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

## BRIEF OF J. R. LAMAR FOR APPELLANT, MRS. ELEANORA D. SPEER.

### STATEMENT OF FACTS.

This was a bill filed by Mrs. Eleanora D. Speer in her own behalf and by Emory Speer, her husband and next friend, to obtain a construction of the will of Dr. E. C. Morgan, of whom she was one of the heirs-at-law and one of the residuary lega-

tees. The will was executed April 22, 1891, and Dr. Morgan died May 5, 1891.

Inasmuch as his death occurred within thirty days of the execution of the will, its provisions came within the terms of the Maryland Bill of Rights, which is of force in the District of Columbia, and by which (sec. 457, Rev. Stat. Dist. of Col.) it is declared that

> "Every * * * devise of goods or chattels to or
> "for the support, use or benefit of any minister, public
> "teacher, or preacher of the Gospel as such, or any
> "religious sect, order or denomination, without leave
> "of the legislature,"

is void "unless made at least one calendar month before the death of the testator."

The opinion of Justice Hagner, of the Supreme Court, and of Chief Justice Alvey, in the Court of Appeals, state the facts of the case very fully, and as the rules of court require "a concise abstract or statement of the case, presenting succinctly the questions involved," we shall endeavor to comply with this requirement for brevity.

The testator's estate consisted of what he had inherited from his father and what he had himself accumulated. The portion made by himself he left to his two sisters, Mrs. Speer and Mrs. Mosher, for life, with remainder to their children. If both the sisters died leaving no issue, then with remainder over

> "to Georgetown University in the District of Columbia,
> "to be an endowment in equal shares of the Literary
> "and Medical departments thereof."

This bequest was attacked as invalid on the ground that Georgetown University was, under the evidence, a teacher of religion, and on the further ground that, under the evidence, a gift to Georgetown University was a gift to the Society of Jesus, a religious order, and void because the will was made within thirty days of the testator's death.

The evidence on this subject is contained in the testimony of Father Daugherty, President, the catalogues (which, by consent, are made a part of the record and transmitted as such to this court—top p. 121, s. p. 234, top p. 124), together with the text books taught in Georgetown University, from which it appears that the course of study at Georgetown is that "generally pursued in the colleges of the Society of Jesus" (s. p. 62), and includes

> "Doctrinal Exposition of Religion; Catechism; Catechism of the Catholic Religion; Christian Doctrine; Handbook of Christian Religion; Chronological Succession of the Popes; On Faith; On the Apostles' Creed; Commandments; On the Means of Grace; On the Sacrament; On the Real Presence; Confession; Indulgence; On the Angelical Salutation."
>
> "Non-Catholics (s. p. 62) are not required to take the Catechism, but all Catholic students are required to approach the Sacrament at least once a month * * * all boarders are required to be present at the public exercises of religion, which are held in the College Chapel, and these exercises are those of the Catholic Church."
>
> "The object of the Society of Jesus is to get a little religion into men (s. p. 69) and the object and aim of the college, as all other colleges, is to teach men a certain amount of human knowledge; and also when we have the opportunity, of conveying the views we hold, and by our discipline and example, urge them on in their spiritual life—in other words, to save their souls."

The Board of Directors and professors are selected by the Superior of the Province. The Board, including the President and Directors, are always Jesuits. They are appointed and removed by the Superior of the Province.

After the suppression of the Society of Jesus by the Bull of Pope Clement XIV in 1773, the order was known as the "Corporation of Roman Catholic Clergymen in America."

By that name it directed the sale of land in 1789 for the purpose of establishing an Academy at Georgetown. Students were first received in 1791, and

> "upon the reorganization of the Society of Jesus in "Maryland in 1805 Georgetown College, as it had "already begun to be called, was transferred to the "Fathers of that Society under whose control and di- "rection the University still remains." (Catalogue 1898–'9, p. 10; Catalogue 1900–'1, p. 17.)

This academy or unincorporated college having no authority to issue diplomas, Congress, in 1815 (6 Stat. at Large, 152), authorized the President and Directors of the College to grant degrees in the faculties, arts, sciences, and other professions to which persons are usually admitted in other colleges or universities of the United States, and in 1833 Pope Gregory XVI signed a decree reciting that "The College of the said Society situated in Georgetown, in North America, having been erected into a university and in all colleges of that Society where courses of philosophy and theology are adopted, great benefit accrued to religion," be therefore conferred the faculty of granting such degrees to the College of the City of Georgetown *of the Society of Jesus.*

In 1844 Congress incorporated the "President and Directors of Georgetown College," and the bill recites that certain named defendants claiming to be the successors of those named in the act of 1844 were asserting a claim to the bequest to Georgetown University under Dr. Morgan's will. The bill denied that the gift was to them or they were the successors in fact.

These individuals answered, claiming the benefit of the remainder under the will of Dr. Morgan for the corporation known as the "President and Directors of Georgetown College." The complainants insisted that the succession had been broken, and that the named defendants under the evidence were not the successors, and that the corporation had been dissolved by the death of all of its members.

The corporation adopted by-laws in 1844 (Record, 49; s. p. 95) providing that "the body corporate shall have power to fill any vacancies," and from 1844 to 1875 the minutes show that the President and Directors met as a *body corporate* and from time to time filled vacancies in the membership. After 1875 (Record, 57; s. p. 111) there was no meeting of the corporate body, but only of *the Board of Directors*, and the vacancies have been filled, not by the corporate body, but by the Board of Directors. The individuals named as defendants in the bill have all been appointed by the Board of Directors, though neither the charter nor the by-laws permit the Board to fill vacancies. As stated above, it also appears that these vacancies were really filled by the Superior of the Province.

The Court of Appeals, however, held (Record, 133) that the bequests went to the President and Directors of Georgetown College under the act of 1844.

All of the other issues relate to questions of law independent of questions of fact.

Understanding that the rules do not permit a copy of the assignments *in extenso*, we state in brief the

## ASSIGNMENTS OF ERROR.

It is alleged to have been error in the court to hold

(1.) That Dr. Morgan's bequest was to the President and Directors of Georgetown College.

(2.) That there was any President and Directors of Georgetown College capable of taking.

(3.) It is assigned as error that the bequest to the Trustees to "see to the application of $10,000 to Georgetown University, to be held and used as an endowment for the prosecution of research in the Colonial History of Maryland, and obtaining

and preserving archives pertaining thereto" is void (*a*) because the gift was for a benevolence rather than a charity, and as a charity it was void because of the uncertainty of its terms, and (*b*) the failure to designate beneficiaries; because (*c*) it created a perpetuity not for a charity; because (*d*) the Trustees were to see to the application, and to devise a scheme for the management of the funds, and one of the Trustees having died and the other having resigned, it was impossible for the court to administer the trust, and (*e*) it was also alleged that this devise was void, inasmuch as a gift or a trust in favor of Georgetown University was a gift to a religious order.

(4.) The gift of a sum, *not to exceed* $5,000, to be applied and expended under the personal supervision of the Trustees, for the erection of a chime of bells and a memorial window in some Catholic church to be designated by his mother, and if that gift was void, said sum, *not exceeding* $5,000, to be equally divided between St. Vincent's and St. Joseph's Catholic Orphan Asylums, was void—the court's ruling to the contrary was assigned as error because it was a gift to religious orders; because the amount of the gift was uncertain, and because the amount of the gift had to be determined by the Trustees, and one being dead and the other resigned, it was impossible to determine what amount should be given and what amount should be equally divided between the two hospitals.

(5.) The direction to pay and see to the application of a sufficient sum, *not to exceed* $3,000, to maintain a medical scholarship in Georgetown University, or in some medical college in the District, was void for the same reasons. The sum was uncertain; there was no scheme to decide how or by whom the scholars were to be selected—whether by the Trustees or by the Faculty of the College—and there was

no designation of the persons or class to whom the scholarships should be awarded.

(6.) The provision to pay and see to the application of $5,000 to form a fund, known as the "Carroll Morgan Fund or Scholarship," to be applied as the testator might thereafter *verbally* indicate to his trustees, or, if he failed to so indicate, then as his trustees, with the advice of proper persons, might decide, was void for uncertainty, because there was no verbal instructions given and because the trustees had not, with the advice of proper persons, decided whether it should be a scholarship in the scientific or classical department of the University.

## BRIEF AND ARGUMENT FOR MRS. E. D. SPEER, COMPLAINANT IN THE ORIGINAL BILL.

### Teaching, Including Religious Instruction, the Main Purpose of the Society of Jesus.

It not only appears from the record and the testimony of Father Daugherty, but it is a matter of common knowledge, of which the court will take judicial cognizance, that while Jesuits are both teachers and preachers, teaching is the principal object of the order. This teaching is accomplished not only through the instrumentality of the individual brother, but mainly through a community of brothers having their local Houses or Colleges. These Colleges correspond to the Monasteries and Abbeys of other orders. The Franciscans and Dominicans and many of the other Catholic orders live a life of seclusion, removed from society, in Monasteries, Abbeys, and Convents. The Jesuits, on the contrary, make habitual intercourse with society a prime duty, disregard all differences of dress, and engage in mission work and teaching in their colleges.

These facts are to be found in standard works like Bartoli's History of St. Ignatius, where it is stated that "all the establishments of the company are composed either of novitiates, *Colleges*, or professed houses" (38).

The attention of the court is also called to 13 Encyclopedia Britannica, 649, from which it appears that Julius II dispensed the General from the vow of poverty, and the colleges were allowed to hold property (649).

> "The oldest college of the Society was founded in 1552 by King John III of Portugal at Coimbra, and when Loyola died in 1556 the Society had * * * twelve provinces with more than one hundred *Colleges* and houses." (653.)

The course of study at Georgetown is that generally pursued in the colleges under the Society of Jesus (s. p. 62), and includes Doctrinal Exposition of Religion, Catechism, Catechism of the Catholic Religion, Christian Doctrine, Handbook of Christian Religion, Chronological Succession of the Popes, On Faith, On the Apostles' Creed, Commandments, On the Means of Grace, On the Sacraments, On the Real Presence, Confession, Indulgence, On the Angelical Salutation.

> "Non-Catholics (s. p. 62) are not required to take the Catechism, but all Catholic students are expected to approach the Sacrament at least once a month. * * * All boarders are required to be present at the public exercises of religion, which are held in the college chapel, and these exercises are those of the Catholic Church. There was formerly a Theological department, but it has been transferred to Whitemarsh, and there is now no course of theology in Georgetown, but it claims the right to confer honorary degrees in theology (s. p. 65) and from 1817 to 1899 conferred twenty-seven degrees of D. D.
>
> "The object of the Society of Jesus is to get a little religion into men (69), and the object and aim of the college, as all other colleges, is to teach men a certain amount of human knowledge; and also, when we

have the opportunity, of *conveying the views we hold*, and by our discipline and example, urge them on in their spiritual life—in other words, *to save their souls*." (71.)

GIFTS TO THE ORDER.

From these extracts from the testimony of Father Daugherty, its President, it appears not only that students are required to attend religious service of the Catholic Church in the college chapel, and they are given religious instruction in the tenets of the Catholic religion, with a view of *saving their souls*, but it also distinctly and positively appears that the college is not merely under the auspices and influence of the Society of Jesus, but that the Board of Directors and the professors are selected by the Superior of the Province. There is no recommendation or advice, but positive and absolute control.

* * * "The Board, including the President and the Directors, are always Jesuits. When the Superior finds some man, through sickness, or otherwise, must leave, he sends some other man to take his place. Then the Directors elect that man into the position on the Board (150). The position of President and Directors, between ourselves, does not mean so much as the Jesuits are concerned. It is only a disagreeable duty, to have to attend the meetings and to have to go through the business and such things as that. But we have to do it in order to retain our legal existence. So far as the Jesuits are concerned, it does not amount to anything, whether one is a part of the Board of Directors, or not, except as a legal part of it. We carry that out in order to conform to the law, and in order to attend to business as we are doing now." (150–151.)

After reading the very frank testimony of the President, it would require an immense amount of technicality to avoid the conclusion that Georgetown, whether called a university

or a college, is as purely a college or chapter of the order as would be the congregation of a church, though for the purpose of holding property it had a board of trustees incorporated for the purpose of having a legal entity to hold title to the building and some one other than the large membership by and with whom contracts could be made. The secular charter may be intended for secular purposes, but the secular holder is a mere trustee for the religious beneficiaries.

But this is not an open question under the record. All of the evidence makes it manifest that Georgetown University or Georgetown College is but a chapter of the order. It became such at a time when there was room to discuss whether the order was technically and legally in existence or not, and the President makes very clear the distinction between *actual* and *legal* existence of the order.

In 1773 Pope Clement XIV issued a Bull to suppress the Society in every State of Christendom; but because of certain formalities as to publication the Society never conceded that it had been legally suppressed. During that period, however, it did not retain its old name, and in 1785 it was known in Maryland under the name of "Corporation of Roman Catholic Clergymen in America." Under that name it directed the sale of lands for the purpose of establishing an Academy at Georgetown. Students were received in 1791, and

> "upon the reorganization of the Society of Jesus in "Maryland in 1805, Georgetown College, as it had "already begun to be called, was transferred to the "Fathers of that Society, under whose control and "direction the University still remains."
>
> Catalogue, 1898–'9, p. 10.
> Catalogue, 1900–'1, p. 17.
> Maryland Act of 1805, chap. 118.

Certainly, then, in 1805 Georgetown Academy or Georgetown College was a chapter or college of the Society of Jesus. It had, however, no authority to grant degrees or to issue

diplomas, and, without attempting to incorporate the existing institution, Congress in 1815 (6 Stat. at Large, 152) authorized

> "the President and Directors of the College to grant "degrees in the faculties, arts, sciences and other pro- "fessions, to which persons are usually admitted in "other colleges or universities of the United States."

After the passage of this act of 1815 the institution began to be known as Georgetown University, and Pope Gregory XVI evidently construed this broad authority to grant degrees as erecting the College into a University, for in 1833 he issued a Bull in which it was recited that

> "The *College* of the said *Society* situated in Georgetown in North America has been erected into a University, and that in all colleges of that Society where courses of philosophy and theology are adopted, great benefit accrued to religion, he conferred the faculty of granting such degrees to the *College of the City of Georgetown of the Society of Jesus*."

A gift to this institution would undoubtedly have been a gift to the Society of Jesus, and in his opinion Justice Hagner (s. p. 195) said:

> "Under the conditions then existing, it is clear that benefactions given to the institution as then conducted would have been as fully within the prohibition of the 34th article of the Declaration of Rights as though they had been bequeathed to any of the avowed theological institutions or divinity schools in the country."

Nothing has occurred since then to destroy the character of the institution. It is now under the same power; it is now radiating the same influence. If in 1835 a death-bed gift to it would have been void, because of the law protecting the heir against religious influences, the same result would follow now if the same influence radiates from this

same source. The law would not be defeated of its purpose because that influence worked through the same men organized into a legal entity. The force of gravity is not lessened because of the interposition of some intervening object, and the religious influence of the order is in no wise minimized because it uses a secular instrumentality for perfecting its organization and carrying on its work.

The act of 1844, if it has any effect whatever, crystallized, strengthened, and made permanent that part of the religious organization which had to do with the secular affairs of life, but it did not minimize or lessen the influence which radiated therefrom, nor did it destroy the animating spirit of the order which gave life and vitality to the organization.

### Secular Charter Does Not Destroy Religious Order.

Similar questions have been before other courts, which have been called upon to decide whether a *secular* charter prevented a school conducted by a religious denomination from being a *sectarian* institution. The question is most important and far-reaching; for if a charter from the State by its silence can destroy the religious character of the influence which works through the corporate entity, then the provisions of the various constitutions prohibiting grants to *sectarian* institutions can be absolutely nullified and the fundamental law can be easily abrogated.

Such has not been the ruling of the courts which have dealt with this important subject.

It was therefore held in State *vs.* Hallock, 16 Nevada, 373, that a school connected with an orphan asylum controlled exclusively by officers of the asylum who were Sisters of Charity, and in which religious instruction was given to Roman Catholic children, is a *sectarian* institution within the constitutional prohibition against using public funds for sectarian purposes.

See other cases cited in 14 L. R. A., 418.

In Kelly *vs.* Wellborn, 110 Ga., 540, a gift to trustees for building a house for the Methodist Church was held to be void within the meaning of the prohibition against a gift to a religious institution. The trustees might have been irreligious or members of another church, but the court was construing a statute that had a definite purpose; it looked through the shadow to the substance, and held that the gift was not to them, though the title was in them.

In Kerr *vs.* Dougherty, 79 N. Y., 51, the court held that Union Theological Seminary was both a literary and a religious society.

In Kendrick *vs.* Cole, 61 Mo., 527, there was a gift to Archbishop Kendrick. The will was changed and the second gift was to John Kendrick, but the evidence showing that the bequest was for the benefit of the church, it was held that the devise was void because of the provisions prohibiting devises to religious sects.

And the policy of the law and the rules for construing these and similar provisions of the law is strikingly illustrated in Knight's Estate *vs.* Liberal League, — Pa. St., —, (28 Atl., 303). It appeared there that the Pennsylvania law prohibited a devise to religious societies. The League had been chartered for the dissemination of scientific truth by means of music, literature, lecture, and debate. All persons, whether Christians or infidels, were eligible to membership. It opposed all "isms." A debate in favor of Christianity was followed by one against it. Many would claim that the League was "irreligious;" but it did something about religion, and that was enough to bring it within the purview of the law, and the devise was held to be invalid.

> "If in any sense of the word, 'religious,' this Society is a religious organization, and money given for its use is given for a religious use."

Compare that case with this. We have here a mountain of facts compared with a mole-hill there. They met for

*debate* on Sundays. Here every student was required to attend *religious* services. They opposed all "isms." Here Christian Doctrine, the Creed, the Sacrament, and Theological text books are taught. They taught infidelity. Here the Catechism. There they opposed all religions. Here the testimony of the President is that the object is, in part, to help the students save their souls "and when we have the opportunity *of conveying the views we hold.*"

We confidently insist, therefore, that if this gift had been to the "President and Directors of Georgetown College, incorporated under the act of 1844," it would, in the light of the evidence and of these decisions, have been void.

But the gift was not to the "President and Directors of Georgetown College." On the contrary, it was to "Georgetown University," an institution of the order recognized by the act of 1815 and having from the Pope the power to grant degrees in theology—an institution recognized by Papal Bull as being a "*college of that Society, where (when) courses of philosophy and theology are adopted, great benefit accrued to religion.*"

This was an institution which, under act of 1815, had the right to grant degrees in the arts and any profession and the right to grant the degrees of D. D. or M. D.

### Misnomer.

There is a gift to Georgetown University, but the defendants seek to avoid its invalidity by the doctrine of misnomer, but there is absolutely no evidence to show that Dr. Morgan intended anything other than was expressed in his will. On the contrary, it appears that his entire will was dictated by a desire to serve pious uses, and that these pious uses were to be administered by or for the benefit of the Society of Jesus. He gave to a religious institution. It is sought, without evidence that such was his intent, to show that the gift was to a secular institution. There were in the

same city two institutions—one known as "Georgetown University," the other as President and Directors of Georgetown College." There being two persons, each having a distinct name, each dwelling in the same building, it would take very strong and direct evidence to show that the testator meant something other than what he said; for where there is a beneficiary which meets the language of the will the court will give effect to the language used, even if in so doing the law interposes on behalf of the heir.

Suppose this will had been made sixty days before Dr. Morgan's death, and there had been a contest between Georgetown University and the President and Directors of Georgetown College, can it be doubted that in the state of this record Georgetown University would have taken?

Undoubtedly the record shows that the "Corporation of Roman Catholic Clergymen" in 1805 transferred this property "to the Fathers of the Society, by whom the property has since been controlled and directed."

There is nothing to show that the title has ever been transferred by the Fathers of the Society to the newly created organization under the act of 1844, and no careful lawyer would take a deed to the property if signed by the President and Directors of Georgetown College, for the fee is not shown to be in them, but remains where it was put in 1805; and when Dr. Morgan gives more property to Georgetown University he gave it to that organization recognized by the act of 1815 and still holding the title to the land and buildings.

That this argument is supported by the testimony will appear from the evidence of Father Daugherty, who when asked "are the Society of Jesus and Georgetown College two different institutions?" answered:

> "They are two different institutions in this sense, that the Society or a certain portion of them get together and form this corporation. Every house in the Society is independent of every other. They are

like the government of two States. They have a certain number of laws which are in common, but they have other laws which are special to each."

If they are different organizations they are indissolubly connected, all having a common purpose. But if this common purpose is to be disregarded and the situation resolved into its component parts, the evidence shows that there are three manifestations on the College Hill:

First. The Society of Jesus, which is the central organization, animating, dominating, and controlling.

Second. Georgetown University, which is but a continuance of Georgetown Academy, recognized as a distinct institution under the act of 1815 and the Bull of Gregory XVI.

Third. The President and Directors of Georgetown College.

But the three are as closely knit as body, soul, and spirit. A gift to either one is a gift to the other two. But if a distinction is to be made, and the body is to be separated from the spirit, then when either is named, the gift is to that which is named. Had the gift been to the President and Directors of Georgetown College, the evidence was insufficient to show that it was intended to Georgetown University, and, conversely, where the gift is to Georgetown University, there is nothing to show that it was intended for the President and Directors of Georgetown College.

The attention of the court is specially called to a most important fact. The Catalogue was issued the year before Dr. Morgan died. His name appears therein as a professor, and in stating the history and power of the University, no allusion whatever is made to the act of 1844. On the contrary, *that act is conspicuous by its absence.* In stating the history of the organization, the Catalogue recites:

"Georgetown University,
Founded in 1789.
Chartered by Act of Congress, March 1st, 1815.
Empowered by the Holy See
To Grant Degrees in Philosophy and Theology
March 30, 1833."

We take, therefore, not only Dr. Morgan but the institution at its word. The gift was, in terms, to Georgetown University. At the time the gift was made the institution was, in its Catalogue, holding itself out only under the act of 1815 and the Papal Bull, and to say that Dr. Morgan did not intend a gift to this Georgetown University is to make him give to a secular institution when he intended his benefaction to go to the religious institution for pious uses.

### Bradfield vs. Roberts.

In this view of the case, Bradfield *vs.* Roberts, 175 U. S., 291, is not involved. But, as Justice Hagner seemed constrained by it and as Chief Justice Alvey followed it, it may not be inappropriate to say that the ruling there made would not sustain these gifts, even if Dr. Morgan had made his bequests in favor of the President and Directors of Georgetown College. That case held that a payment to a hospital conducted by Sisters of Charity was not in violation of the provision in the Constitution of the United States prohibiting Congress from making an establishment of religion. It is difficult to see how the ingenuity of counsel could have invoked that clause in that case, but the provision of the Constitution of the United States preventing the establishment of a religion is nothing like so minute as the prohibition in the Maryland Bill of Rights. The latter not only prevents a gift to a church, but, evidently for the very purpose of leaving no loophole, it prohibits a gift not only to a *sect*, but to an *order* in a sect. And then, for fear that that was not broad enough, it descends into still minuter details and pro-

hibits a gift to a *preacher* of religion. Apparently, for fear that this might be construed to relate to ordained ministers, it goes one step further and prohibits a gift to a *teacher* of religion.

A moment's consideration will show that gifts which would be valid under the Constitution of the United States would be invalid under the Maryland Bill of Rights. Congress from year to year makes payments to *chaplains* in the Army, and to the *Chaplain* of the House of Representatives and of the Senate. But a gift to that same Chaplain would be void under the Maryland Bill of Rights if made within thirty days of the testator's death.

In the Bradfield case the allegation was that the hospital was conducted under the auspices of the Roman Catholic Church. The evidence here is not that Georgetown University or Georgetown College is under the auspices of the Society of Jesus. They are conducted by the Society of Jesus. They are absolutely controlled by the order. The Superior appoints President, Directors, and Professors. He also removes them at pleasure. His suggestions are not advisory, but commands, and inasmuch as the Society is not incorporated by any secular charter, if a gift to one of its colleges is not a gift to the order, then so far as the Maryland Bill of Rights is concerned, it is impossible to give to the order.

The only outward and visible sign of the Society is found in its colleges. The catalogues do not speak of Georgetown University as being under the auspices of the Society, but say that in "1805 the property was transferred to the Fathers of the Society, by whom it has since been *controlled and directed.*"

If Bradfield *vs.* Roberts is to be given the construction put upon it by the defendants, the effect will be to make a perfectly easy way of defeating not only the purpose of the Maryland Bill of Rights, but also to defeat the constitutional provisions of many of the States prohibiting gifts to sec-

tarian institutions. It will upset that line of authorities which recognize that an institution may be both literary and religious.

DEVISE TO HOSPITALS VOID, BEING TO RELIGIOUS ORDER.

What has been said as to the policy of the law and as to the misnomer of the University relates also in part to a devise to hospitals. The names of both hospitals are incorrectly stated; but it is perfectly evident that testator intended to devote his money to pious uses, and that the money should inure to the benefit of the Catholic orders which were maintaining the hospitals. This is manifest, because he first gives the money to establish a side altar in a church, by name. Recognizing that this was in the teeth of the statute, he then gives to *Catholic* hospitals—to hospitals under the control and bearing the names of Catholic orders. Keeping in mind the policy of the law, and that each time the testator gives to a *Catholic* Church, to a *Catholic* hospital, it is evident that the purpose of the statute will utterly fail if these gifts are sustained. If, instead of the statute prohibiting such gifts, it had provided that all wills were void if made within thirty days, except where there was a devise to a religious order or to a sect, preacher, or teacher of religion, it is evident that these hospitals, as well as the University, under the evidence, could have recovered on the evidence appearing in this record.

DEVISE FOR COLONIAL RESEARCH IS VOID.

> "To Trustees to pay and see to the application of $10,000 to Georgetown University to be used as an endowment for the prosecution and research of Colonial History of Maryland, and preserving archives relating thereto."

1. If it is treated as a direct gift to Georgetown University, it fails for the reasons already given. It was a gift to a religious order.

2. If treated as gift to the President and Directors of Georgetown College, it fails, because the act of 1844, in so many words, prohibited that corporation from employing its funds or income "for any purpose or object other than those expressed in the first section of the act." They were not authorized by that act to do anything except conduct the college, and it is nowhere authorized to act as a trustee in its corporate entity or to conduct such investigations.

3. Whether to the University or to the College, the gift did not create a charity, but a mere benevolence, which cannot be enforced.

4. It is not a charity, because no provision is made determining what class of the public is to receive the benefit of the investigation, nor on what terms the information is to be disseminated or how the archives are to be examined.

5. There are no beneficiaries named or described. There is no person described who could come into court to enforce the trust, and there is no provision that the documents are to be given without compensation.

6. The provision to "see to the application" contemplates that the Trustees should themselves devise a scheme. The death of the one and the resignation of the other makes it impossible for the Trustees to "see to the application," and the gift cannot be effectuated under the *cy pres* power, for it does not exist in the District.

Fontaine *vs.* Ravenel, 17 Howard, 369.

This not being intended as an absolute gift to Georgetown University, but to it in trust, and the trust failing, the property must descend either to the heir or to the residuary legatee.

Stratton *vs.* Medical Inst., 148 Mass., 505.

Maught *vs.* Getzendammer, 65 Md., 727.

The effect of this trust to pay and see to the application of ten thousand dollars to Georgetown University, to be held as an endowment for the prosecution of research in Colonial History, is very carefully considered in the opinion of Justice Hagner, and we cannot do better than quote therefrom. He says:

I do not consider this as a valid devise or bequest to the Georgetown College, within the declared purposes for which alone it was incorporated, as "expressed" in the first section of its charter. Of the ten thousand dollars thus described no portion, under the natural construction of the clause, would be expended in the instruction of any youth in the "liberal arts and sciences;" nor does it appear that any student connected with the college would ever derive the slightest benefit from any results that might arise from the prosecution of the researches so vaguely referred to. There is nothing to show that any professor or other official of the college could claim any right to interfere in the management of the project; and if any such selection were to be made, the only effect of imposing the prosecution of the proposed research upon the college would be to withdraw some of its teachers from the performance of their regular chartered duties. It is plain the college would have had no right to use its own regular revenues for the work of exploring remote history, or to obtain and preserve what it should acquire; no more could it properly use any benefactions it might receive from other sources for such foreign purposes. The 5th section of the charter declares the corporation shall not employ its funds or income, or any part thereof, for any purpose or object other than those expressed in the first section of the act (not "signified" or "indicated," but named with precision therein). 5 Thompson on Corporations, p. 5772; 2 Kent Com., 229, 240). This precaution is in sympathy with the other safeguards on this point elsewhere expressed by the charter, the law of its being. The proceeds of the lots given by the Government were required to be invested, and the dividends used to aid in the establishment of professorships, &c., and so of the moneys to be received under the authority of the act of 1797, chapter 45, from donations. The college would have no more authority under its charter, to expend the ten thousand dollar fund for re-

searches in colonial history than in researches into the history of any other time or country; and if the heirs-at-law are to be deprived of this part of what was their grandfather's estate in such explorations as are herein indicated, it should only be by the employment of very clear words effecting their disherison, under the plain powers of the charter?

2 Underhill on Wills, p. 903, p. 1386.

The provisions as to the management of the money are in the highest degree uncertain. It is spoken of as an "endowment" and as a "fund," and it is to be "used" and also "held." How much is to be used and how much to be held? In whose name are the funds and property to be held? And how are the archives and papers to be obtained? And what are to be considered as archives "having relation" to the colonial history? There is no power under the charter confided to the officials of the college to assume any such power, so foreign to their duty as instructors of youth in the liberal arts and sciences. I do not believe these delicate and extensive powers are transmissible in their character, and they are therefore not capable of performance by the substituted trustees, nor by the College authorities.

The trust is further invalid, as there is no beneficiary who could complain to the court for redress for any misfeasance, malfeasance or non-feasance on the part of the College or of the substituted trustees.

The clause imposes a strict duty upon the two trustees named in the bill. To them, *nominatim*, and to their heirs and assigns is given full power to sell the property and reinvest the proceeds *in trust* nevertheless to pay the money to the university and also to see to the application of the money thus paid, which is to be used and held as an endowment. Not only are the trustees to see to the investment of the principal of the fund and its reinvestment, but as they are effectively to see to the application of the money, they necessarily must be also charged with the disbursement of the income, and of part of the principal also, if the archives to be purchased exceed in cost the income. To them also must be committed the direction of the character and extent of the researches and of the archives and papers which are to be obtained; if their duty "to see to the application" of the money is to be effectively performed. It thus

appears the trust committed to them was one to a large extent personal and discretionary, involving the exercise of skill and judgment, confided to them, apparently, as a personal confidence, as is plainly done in other parts of the will; and therefore not of a character to be exercised by the successors in the trust. And yet, both those trustees are no longer connected with the trust, and Messrs. Mosher and Colbert have taken their places as substituted trustees; without any suggestion that they were at all acquainted with the personal wishes of the testator, or would ever have been selected by him to perform his wishes, to so great a degree hidden in his private thoughts.

That the prosecution of historical researches and obtaining and preservation of archives and papers relating thereto, would much more properly be within the function of an historical society, incorporated "for the purpose of collecting, preserving and diffusing information relating to the history of the State of Georgia in particular and of American history generally," than of a college expressly limited by its charter to the instruction of youth in the liberal arts and sciences, would seem too plain for question; and yet the Supreme Court in 107 U. S., 189, Jones *vs.* Habersham, speaks with very serious doubt on the subject whether the Georgia historical society could exercise similar powers under a will, and it could say nothing stronger in answer to such doubt than to declare: "There is some ground for holding that the objects of a historical society would be promoted by administering a devise and bequest to maintain for the public instruction and benefit a house containing a collection of books, documents and works of art with other such books and works to be selected by the officers of the society and purchased out of the surplus income, and that the purposes of the trust are, in the words of Mr. Justice Story in Vidal *vs.* Girard, 2 Howard, 189, 'germane to the objects of the incorporation,' and relate to matters which will promote and aid and perfect these objects;" and the court contented itself with saying further that if any doubt remained of the capacity of the historical society to assume the trust, the equity court could appoint other trustees instead of the historical society. If such evident doubts should have beset the court with respect to the words of that devise and the capacity of the beneficiary there explicitly named, to assume a trust so much more germane to the functions of an impor-

tant historical society, which kept a public library for the use of all comers, and whose charter expressed that it "shall be a public act, and shall be construed benignly and favorably for every beneficent purpose therein intended;" it is inconceivable that court could have found the provision before us to be "germane to the objects of the incorporation." Of what value would it be, hereafter, to insert in any charter of a college that its funds and income shall *not* be employed for any purpose or object other than those *expressed* in a particular section referred to, if provisions thus limited may be enlarged at pleasure; so that when thus changed they may read as though the will had commanded the funds *should be used* and employed for *any project* that might appear tempting or profitable—whether it shall be the purchase and exploitation of some promising invention; or the fitting out of exploring expeditions to unknown lands; or embarking in any other adventure which it may be incorrectly pretended may promote instruction of students?

In addition to the authorities above cited by the learned judge, the attention of the court is called to the fact that

THE COLONIAL ENDOWMENT FUND IS NOT A CHARITY, BUT RATHER A BENEVOLENCE.

Devises for keeping up a yacht race, base-ball ground, club-house, race-track, or athletics would be invalid, even though they promote health, physical and mental.

2 Underhill, 1197.

The charity must be public. If it is private, it will fail for want of a certain and definite *cestui que trust*, and if it is private it must not involve the rule against perpetuities. Consequently a gift to "keep corn on hand," to "establish a private museum in Shakespeare's house," to "sustain a library supported by the private contributions of its members," or "buying annually a cup for a yacht race," or "to establish a school," where it does not affirmatively appear but that the school might be private, or "to keep the family

homestead in repair for the benefit of the family," are all private, and therefore invalid. A library may be public, if primarily for a limited class of clergymen, provided it is not confined to them but may be used by the public generally.

2 Underhill on Wills, 811, pp. 1198, 1199.

The World's Columbian Exposition at Chicago was not a charitable trust, although intended to effectuate a public enterprise largely of an educational nature.

2 Underhill, 1197; 50 Fed., 654; 65 Fed., 630.

Gifts of money to "keep clock in repair and house open for visitors" is purely private and personal. It seeks to create a perpetuity to insure the care of those charges. It does not run to corporations authorized by charter to receive such gifts.

Kelly *vs.* Nichols, 21 Atlantic, 907 (bot.).

Whenever a bequest may be applied to other than charitable uses, the bequest is invalid. A little charity cannot preserve the entire bequest.

*Ibid.*, 909.

The court cannot resort to the *cy pres* doctrine to carry out the charitable intention of testator, since such doctrine can be resorted to only where it appears that the bequest is a charitable one.

Mason *vs.* Perry, 48 Atlantic, 671.

Devises for benevolent purposes are invalid, because benevolence is broader than charity in its legal signification, and where the bequest could be applied to other than strictly charitable purposes, the court will not execute the trust. And where the devise was the employment of funds for purposes of mutual benevolence, the devise is invalid under the common law of Pennsylvania or the statute of 43d Elizabeth. A devise may be made to a Masonic lodge

for corporate purposes, and it would then be a valid bequest, as the testator had the right to bestow his absolute benevolence as he pleases, but giving to said lodge a devise as trustee did not have the effect of changing the purpose of the lodge into a charitable institution; for this latter to be valid, the bequest should be made for purposes which are clearly charitable.

As to the devise for entertainment, in Mason *vs.* Perry, 48 Atl., 677, the court says:

> "The property was given in trust for purposes that are charitable, but if these purposes are joined with words which authorize the trustee to expend some indefinite portion of the fund for a purpose which is not charitable, the trust is void. Otherwise, it would be in the power of an individual to make a perpetuity of the property to any extent by devoting some small portion of the undivided income to some charitable purpose. A little charity cannot preserve the entire bequest. If an ascertainable portion be given upon a valid trust and another portion upon a void trust, the whole fails." (Citing 25 Atlantic, 840.)

The devise was therefore held void, although "entertainment" might include moral, intellectual, or spiritual entertainment, it is not synonymous with charity and the doctrine of *cy pres* will not help the case. The court administers the trust as expressed in the will. If the will includes what is not a charity, the court cannot, by its administration, exclude it, but the whole must fail. The *cy pres* doctrine can only be resorted to when the bequest is a charitable one, but no forced construction will be adopted in order to uphold the gift.

Mason *vs.* Perry, 48 Atlantic, 677.

## Devise for Scholarship Void.

There are three bequests in this will, each of which are rendered void by their uncertainty; by the fact that the Trustees' personal discretion is involved, and by the further fact that the death and resignation of the Trustees have made it impossible to determine, in a legal way, the testator's wish.

The requirement

(1) That the executors are to *see to the application* of $10,000 towards the endowment fund for Colonial Research;

(2) That they are to *apply not exceeding* $3,000 to a literary scholarship;

(3) That they are *to apply not exceeding* $5,000 to a medical scholarship;

renders void each of these three devises.

In the case at bar the testator has left the method of appropriating the $10,000 to the Colonial Endowment Fund to be determined by the Trustees. He has also left the amount to be appropriated to the scholarship uncertain and indefinite. It does not appear whether the scholarship was to be invested and the sum given for the payment of tuition fees, or whether it was to include tuition and board, or tuition, board, and clothes, or whether it was to be for tuition, board, clothes, and right to travel. All these classes of scholarships exist, but a sum sufficient for one would be entirely inadequate for another, and where the will is uncertain and the amount out of which the scholarship is to come is not described, except by the phrase "not exceeding $3,000," there is no room for applying the doctrine "that is certain which can be made certain."

But rather we have a case of "multiplying uncertainty by uncertainty, resulting in a product of confusion and indefiniteness." The only persons by whom the certainty could

have been reached are no longer legally in existence. In the District of Columbia, where the doctrine of *cy pres* does not apply, the court will not undertake to clear up the confusion and make that valid which was invalid as it was executed.

A will is a legal expression of a man's wishes as to the disposal of his property after his death; but he must make the will; he cannot appoint an agent for that purpose. Or, if he does, and that agent dies or resigns, the uncertainty cannot be removed by the court unless there is data sufficient on the face of the will.

Here, the Trustees were given a sum not *exceeding $5,000*, to be expended, first, in the purchase of a chime of bells, and either a side altar or memorial window, for some Catholic church, to be designated by his mother, and if that gift be void said sum, not *exceeding* $5,000, is to be applied to the two hospitals.

It does not appear what a chime of bells may cost, nor what the memorial window would cost; and that uncertain sum, not exceeding $5,000, is to be divided between the two hospitals.

The next gift, *not exceeding $5,000*, was to be applied as the testator might verbally direct, or, failing that, as the Trustees, *with the advice of proper persons*, might decide, to the maintenance of a scientific department in Georgetown University.

To give property to an agent to do with it as he pleases is equivalent to a conveyance in fee, but where the gift is to an agent, and it appears that the agent is to act as a trustee, but the amount of the gift or the object of the trust is not definitely stated, the devise fails.

See Maught *vs.* Getzendammer, 65 Maryland, 527.

As to such devises the courts will refuse to act, for to enforce such bequests would in effect be to make a will for the testator.

A court of equity has no such general powers; the United States courts of equity have no such powers. The statute of 43d Elizabeth did confer such a prerogative on the chancellor, but it was not a judicial power, but was conferred upon him as the representative of the King, and was a branch of the King's prerogative as *parens patriæ*, and though it may be exercised in those States, cannot be enforced in the District.

### Object to be Selected by Trustee or Amount to be Fixed by Trustee, The Devise is Void.

This will appear from Fontaine *vs.* Ravenel, 17 Howard, 369 (decided after the Girard Will Case). A Pennsylvania testator empowered the executors to distribute his estate among such charitable institutions of South Carolina and Pennsylvania as they might deem most beneficial to mankind.

The court said that the United States courts could not exercise any equity power except those conferred by acts of Congress, and those judicial powers which the old court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised at the time of the formation of the Constitution of the United States. Powers not judicially exercised by the chancellor by authority of the King's prerogative are not possessed by the circuit court. In that case the trustee died before the life tenant, and the court held that the testator had relied on their discrimination, their judgment, and the fitness to carry out so delicate and important a power. They died before they had the power to appoint, and now what remains of those bequests on which a court of chancery can act? Nothing short of the prerogative powers would seem to reach the case. The court therefore held that if such a power could be exercised in England by the chancellor, it could not be by any court in the United States.

To similar effect is Maught *vs.* Getzendammer, 65 Maryland, 527. The devise there was to B, to use the same for such charitable purposes as in his judgment would best promote the cause of Christ. To create a valid trust, the language should exclude all discretion in the party; the subject-matter must be certain and the object must not be too indefinite.

So in Wheeler *vs.* Smith, 9 Howard, 55.

So in Prettyman *vs.* Baker, 46 Atlantic, 1020, and Nichols *vs.* Allen, 130 Mass., 211; Olliff *vs.* Wells, 130 Mass., 321.

We quote again from Justice Hagner:

"In the event this clause and gift be void, I direct said sum, not exceeding $5,000, shall be equally divided between St. Vincent and St. Joseph's Catholic Orphan Asylums in the city of Washington."

The same difficulty attends this devise; that the sum to be divided is uncertain—"not exceeding $5,000," which means any sum less than that amount. Although the names stated in the clause were incorrect, yet as the asylums meant by the testator are sufficiently evident, the misnomer in the title would not affect the gift; but under the proof, they are within the operation of the 34th article of the Declaration of Rights, for they are undoubtedly so associated with the Roman Catholic Church as to subject the bequest to the operation of the Declaration of Rights, and for that reason are void; as the testator postponed the execution of his will just thirteen days too long.

The testator confessedly distrusted the validity of the entire clause of which this was the last provision; and the suggestion in this bequest shows that he had been warned of the probability that such would be the judgment of a court on the point.

Clause (G). Following the introduction common to this and the previous two clauses, the present reads thus:

"Third. A sufficient sum, not to exceed $3,000, the income to be applied to maintain a scholarship in the study of medicine, preferably in Georgetown University; otherwise in some medical college in the District, to be known as the 'E. Carroll Morgan scholarship'" (with a proviso as to the qualifications of the applicants for the place).

Several of the objections already considered to the previous clauses are applicable to this provision.

1st. There is no definite sum named to be applied to furnish the income indicated.

2nd. The trustees named are to pay and see to the application of an indefinite sum to be withdrawn from the residue of the estate, *ex parte paterna*, which is to furnish an income for a scholarship in the study of medicine in some college not named, to be selected by trustees, one of whom is dead, and the other resigned from the trust.

62 Maryland, 499, Powers *vs.* Jordan.
75 do., 252, Gambell *vs.* Trippe.

"Had the legacy been valid in the first instance, it would have lapsed because of the death of the trustee." That the person is to be selected for the scholarship, under this and the following clause, by competitive examination by the faculty of Georgetown University, adds additional uncertainty to the provision. Such examination is not one of the duties of the college officials under the charter; and the applicant least in need of the assistance may obtain the benefit of this provision.

Uncertainty pervades the clause in every feature.

It is well settled that where a gift to what may properly be called a charity is so indefinite as to be incapable of execution by a judicial decree, the representatives of the donor must prevail over the charity.

8 N. Y., 526, Williams *vs.* Williams.

This is especially the case where the gift is a mere benevolence or liberality.

29 New Jersey Equity, 46, Decamp *vs.* Dobbins.
95 New York, 82, Pritchard *vs.* Thompson.

Clause "*h*" is obnoxious to several of the objections made to it by the complainants.

The bequest is to his trustees "*to pay and see to the application* of the sum of five thousand dollars to form a fund known as the E. Carroll Morgan Fund or Scholarship, to be applied as I may hereafter indicate to my trustees, and, if I fail, as my trustees with the advice of proper persons may decide, to the maintenance of a scientific department, or the foundation and application of the income to a scholarship

in the classical department in the University of Georgetown in the District of Columbia."

1. There is nothing to show the testator *ever did indicate to his trustees* in any manner his wishes as to the application of the fund or scholarship to be formed.

In case of failure to do so, his trustees were "to take the advice of proper persons," as to the maintenance of one or other of the scientific departments or scholarship referred to. It is clear the duties thus confided to his trustees were intended to be performed personally by Messrs. Stephenson and Magruder, and not by other persons to be appointed, if at all, after the death and resignation of those persons thus named. Of course the testator never could have contemplated indicating verbally his wishes, to persons whose names he could not even guess at, when he made his will, and who could only come into existence as substituted trustees after the testator's death under the appointments of a court.

These substituted trustees are as completely undescribed by his testator as are "*the proper persons*" upon whose advice he desired Stephenson and Magruder to determine what should be done with the money. Being acquainted with those two he had selected to take charge of his estate, he might be willing to trust to their discretion to select "proper persons"; but what guarantee could he have that other persons totally unknown to him would act judiciously in making wise selections of proper private persons equally unknown to him?

These provisions if they mean anything, under the new state of facts, practically allow the unknown substituted trustees and the unknown "proper persons" to make a will for the testator. In the Tilden Will Case, the testator at least had the advantage of knowing his executor personally; but the court refused to sustain the clauses of a will which was to dispose of large properties in the manner agreeable to the wishes of the executor. It was quite enough that Mr. Bigelow should be allowed to make *his own will*, without making one for Mr. Tilden after he had died.

A clause which is in effect a mere authority to a third party to direct how a specified sum shall be disposed of is inoperative, and the sum named therein being a void bequest, falls into the residue of the estate.

53 Conn., 242, Bristol *vs.* Bristol.

Since these first provisions of the clause are void, whatever is given in the alternative, after the first named appears to be illegal, necessarily fails.

In 17 Rhode Island, 318, Kelly *vs.* Nicholls, a testator devised property to designated persons in trust for a variety of objects—the care of the grounds of his estate; to keep his clock in repair, to entertain ministers of the orthodox Quaker faith, to which he belonged, in his house, and for similar purposes, all of which the court held to be mere acts of liberality or benevolence, instead of charitable uses, and therefore void.

There followed a declaration of a trust which the court held to be valid, in its character, viz., to republish certain writings of the early Friends. But as the previous gifts were void, the further provision as to publishing the books, though valid in its character, was connected with the void trust; and the court, following many decisions in England and in this country, held the entire devise and legacies void. The court, after pointing out in detail the invalidity of the previous disposition, declares: "that these trusts are so controlling in their nature, so unascertainable in their scope, and so inseparable from the trust to publish religious books, that no part of the bequest can be enforced as a charity, and therefore that the whole is invalid."

In 6 Vos., 404, 410, Chapman *vs.* Brown, a gift of a sum in trust to erect a chapel, and if any surplus remains, then to pay it to A, was held void in toto, because the direction as regards the chapel was in contravention of the statute of mortmain, and this legacy failing, no surplus existed; as it could not be inquired into by the court how much the testator wished his trustees to expend for the chapel; which would be necessary in order to ascertain the amount of the probable surplus; which would be necessary in order to ascertain the amount of the probable surplus that the other legatee was to take.

2 Jacob & Walker, 270, Attorney General *vs.* Hintman.

9 Vesey, 535, Attorney General *vs.* Davies.

2 Underhill, section 906.

A Devise for the Colonial Fund and for the Scholarships Is Void Because It Fails to Indicate Who the Beneficiaries Are or How They Are to Be Determined.

Charity or no charity, there must always be some one named or so described that it is ascertainable who is authorized to go into court to enforce the trust. Not only the terms of the trust, but the beneficiary must be certain. 43d Elizabeth allows a broader definition, but while the individual may not be named, the class out of which he is to come must be designated.

In the Colonial Fund there is no attempt to define who is to be the beneficiary, nor what class of the public is entitled to the benefits of the research, nor on what terms they are to be furnished with the results of the investigation, and whether with or without compensation. The authorities declare such a devise, even for a charitable use, to be void, and, for a very much stronger reason, a mere benevolence in favor of nobody in particular is void.

See Tilden Will Case, 130 N. Y., 29, where the court said that the objection is not obviated by the existence of a power in the trustee to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated by the testator with such certainty that the court can ascertain who were the objects of the power.

In Fafarge *vs.* McNamaree, 5 Iowa, 124, it is said that there is in general the same necessity for a *cestui que trust* capable of becoming the beneficiary and so pointed out that that there shall be no uncertainty as there is for a properly defined grantee in a deed.

Now, who is the *cestui que trust* of the Colonial Fund or the two scholarships? It is certainly not Georgetown Univerversity. A corporation can neither read nor enjoy the results of the investigations. Who are to be the scholars who

are to receive the benefit of the Scholarship Fund? Are they to be selected by the Trustees from personal regard, because of poverty, because of intellectual brightness, or by competitive examination? Who is it in the District of Columbia that would have a right to maintain a suit for the enforcement of either or all of these benevolences? No doubt, by apt words and the outline of a testamentary scheme, the testator might have made a valid gift along these lines, but he failed to do so. He left his scheme in the air, or, if not, in the breast of Trustees who are no longer in existence, and he left nothing on record by which the court can determine what his wish was. This indefiniteness carries with it a legal penalty which the courts enforce instead of excusing. This indefiniteness would render void these bequests even in those jurisdictions exercising the prerogative power of *cy pres*, and they are, therefore, doubly void in the District where no such power exists.

In Barnes *vs.* Barnes, 3 Cranch C. C., 269, the sum was definite. It did not provide, as here, not exceeding a fixed amount, but there was a devise in trust of $200 per year, to be used in feeding and clothing among poor and necessitous widows and orphans in Georgetown. It was held void.

"In trust for the use of the white ministry and members of the M. E. Church" was too vague.

Trustees M. E. Church *vs.* Trustees Jackson Sq. Church, 35 Atl., 8.

And in Beekman *vs.* Bonsor, 23 N. Y., 298, a devise to executors for a public dispensary for indigent persons, both sick and lame, was held to be so vague and uncertain that no court or trustee could carry out the intent of the testator.

In White *vs.* Fisk, 22 Conn., 21, a bequest was to trustees for the support of indigent and pious young men preparing for the ministry in New Haven. That was held void for uncertainty.

The court said that

> "the bequest is not given to any college or institution, but only as a legal interest to trustees to be expended or dispensed for the support of individuals falling within the description named * * * the difficulty of carrying out this provision is as great as if no trustee had been appointed, for no rule of determination of appointment is furnished by the will, and no positive or discretionary power of determination bestowed."

This case suggests a very simple test for making manifest the vague and uncertain character of these scholarships and Colonial Endowment Fund. Suppose there had been no trustee named, but the testator had simply given so much money for a scholarship, without more, who would there have been to claim the money? But it is said that a trust never fails for want of a trustee. Very true; but a charitable trust is never maintained merely because there is a trustee. It takes both the trusteee and the declaration of a trust. The court in some instances may supply the want of a trustee by appointing a successor; but no court has ever undertaken to supply the declaration of the trust, and no court has ever appointed a trustee where the testator left it to his own nominated trustee to fix the amount of the trust fund and to declare or see to the application of the fund.

In this case the defendants are forced to ask the court to do both. They ask that a successor shall be appointed to take the place of those who are dead and resigned; that these substituted trustees shall exercise the personal trust conferred on their predecessors, and then that the court will go further and declare the trust, determine what Colonial History is to be examined, what sort of archives are to be purchased, copied, and preserved, what shall be the test of admission to the scholarship, how much is to be set apart as a fund for the scholarship, how much the scholars are to be

paid, and whether these scholars are to be selected by lot, by favor, or by competition.

No such power has ever been exercised by a court of equity, and we respectfully submit in conclusion (1) that the gift to Georgetown College is a gift to the Society of Jesus; (2) that the Colonial Endowment Fund is not a charity, but a benevolence, void for uncertainty of purpose and of beneficiary; (3) that the scholarships are benevolences, void because the amount of the bequests are uncertain, because the beneficiaries are not designated in such manner that they can be determined by the court, and because there is no way of knowing who the testator intended to take, and (4) that the gift to the hospitals are void because gifts to a religious order, and the amounts to be given are vague and uncertain and were not fixed by the testator or by his designated trustee.

Respectfully submitted.

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